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Foreign Policy and Humanitarianism in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror

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**FOREIGN POLICY AND HUMANITARIANISM IN
U.S. ASYLUM ADJUDICATION: REVISITING THE
DEBATE IN THE WAKE OF THE WAR ON
TERROR**

DANIEL L. SWANWICK*

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I. INTRODUCTION

During the 1970s and 1980s, a great debate raged among academics, attorneys, bureaucrats, and politicians regarding the nature and function of U.S. refugee and asylum law.¹ The debate centered on which basis—foreign policy or humanitarianism—should be used for granting protected status to

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1. See *infra* Part II.

an asylum seeker. Holders of the foreign policy view were concerned with the global political implications of grants of asylum and argued that the system should be wielded as a tool of foreign policy, just as it had been throughout the Cold War. U.S. immigration officials pursued this goal by granting asylum to individuals fleeing U.S. enemies, thus showing those enemies to be persecutors, and similarly by refusing to grant asylum to individuals fleeing U.S. allies, in order to avoid making those allies look bad. Those holding the humanitarian view argued that asylum seekers' claims should be adjudicated only through reference to humanitarian factors, such as past or likely future persecution, and that foreign policy had no legitimate role in the process.

As I discuss in Part II, after the end of the Cold War the debate appeared to be over. Humanitarianism, which had been the stated policy of Congress since the passage of the Refugee Act of 1980, gained the full backing of the courts and the executive branch. Because there was no longer a global ideological battle in which asylum grant rates could play a role, there were relatively fewer pressures on asylum adjudicators to decide cases based in part on U.S. foreign policy.

However, the rise of the global War on Terror presents a new ideological context for asylum adjudications, and a new opportunity for the operation of foreign policy pressures on the system. In Part III, I use data from the U.S. Immigration Courts to explore whether these pressures are in fact operating today in a manner similar to the way they operated during the Cold War. I find a positive correlation between a country's status as an ally or enemy of the United States in the War on Terror and the asylum grant rate for that country. This result leads me, in Part IV, to conclude that foreign policy is operative in the asylum adjudication system today, although in a much more subtle way than it was during the Cold War.

I end the Note with a brief discussion of the "proper" roles of humanitarianism and foreign policy in asylum adjudication, concluding that while both are always present in the system as inputs, adjudicators should aspire to a system driven by humanitarianism. To accomplish this, adjudicators should identify and minimize the effects of foreign policy considerations.

II. FOREIGN POLICY AND HUMANITARIANISM IN ASYLUM ADJUDICATION

Historically there has been a tension between the grant of political asylum as a humanitarian act and as a tool of foreign policy.² Both conceptions have

2. See, e.g., Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J. 277, 309 (2004); see generally John D. Griffin, *The Chinese Student Protection Act and "Enhanced Consideration" for PRC Nationals: Legitimizing Foreign Policy While Averting False Positives in Asylum Law*, 66 U. COLO. L. REV. 1105, 1145–56 (1995); Joan Fitzpatrick and Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 WILLAMETTE L. REV. 751, 769 (1992); Arthur C. Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243 (1984); David A. Martin, *The New Asylum Seekers*, in THE NEW

been perennially present in the United States, but for much of the second half of the twentieth century, coinciding with the height of Cold War politics, the latter was dominant. For the time being, I will defer addressing the normative question of whether humanitarianism or foreign policy is the “proper” basis for making asylum determinations and focus instead on a descriptive approach; I will address the normative question in Section V.

Throughout the 1980s, many commentators identified the presence of strong foreign policy considerations in the operation of the U.S. asylum system. For example, in a seminal 1984 article detailing the modern history of political asylum, Arthur Helton noted that nearly every asylum procedure used by the United States to date had been either explicitly or implicitly biased in favor of those seeking refuge from our Cold War enemies.³ Prior to 1968, the two main procedures under which aliens seeking refuge could be admitted into the United States were strongly biased in favor of those fleeing U.S. enemies.⁴ Then in 1968 the United States became a party to the 1967 United Nations Protocol Relating to the Status of Refugees, thus binding itself to apply the refugee definition set forth in the 1951 Convention Relating to the Status of Refugees.⁵ This definition is neutral with respect to foreign policy considerations, making reference only to an individual’s well-founded fear of persecution.⁶ However, rather than applying the neutrality of the Protocol, “immigration authorities continued to adhere to tradi-

ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S 1 (David A. Martin ed., 1988); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990) [hereinafter Martin, *Coast of Bohemia*].

3. Helton, *supra* note 2, at 243–46. *See also* Doherty v. INS, 908 F.2d 1108, 1118–22 (2d Cir. 1990) (examining the history and purpose of the legislation defining U.S. asylum procedures), *rev’d on other grounds*, 502 U.S. 314 (1992).

4. These two procedures were conditional entry and the Attorney General’s parole power. Conditional entry was restricted explicitly to those fleeing persecution in a Communist or Middle Eastern country, and the Attorney General used his parole power almost exclusively to grant entry to those fleeing Communism. A third procedure, withholding of deportation, was rarely successful—and therefore not essential to our discussion—because aliens seeking it were subject to an entirely discretionary “clear probability” standard, which they rarely met. *See* Helton, *supra* note 2, at 243–46; *Doherty*, 908 F.2d at 1118, *rev’d on other grounds*, 502 U.S. 314 (1992); *see also* Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 WASH. U. L.Q. 59, 100 (1976) (finding no published decisions in which relief had been granted under withholding of deportation).

5. 114 CONG. REC. 29,607 (1968); United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. This note is concerned with the U.S. asylum process, which deals with individuals already present in the United States, and not the refugee process, which deals with individuals who are overseas. However, asylees are by definition refugees, because under U.S. law, an individual present in the United States may be granted asylum only if the Attorney General determines that the individual meets the refugee definition. INA §§ 208(a)(1), (b)(1). Thus, refugee law and policy will be addressed insofar as it is relevant.

6. Refugee Convention, *supra* note 5, at Article 1(A)(2). The Protocol defines a “refugee” as any person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection

tional, restrictive standards”⁷ and the Attorney General continued to allow ideology to dominate decisionmaking.⁸

Even after the passage of the Refugee Act of 1980,⁹ which marked a watershed in congressional attitudes in favor of humanitarianism in asylum adjudication¹⁰ and for the first time codified the foreign policy-neutral Convention definition,¹¹ “[i]deology continue[d] to dominate asylum decision making, translating into ready asylum grants for applicants who fle[d] from Communist-dominated regimes, and into far less generous grants for those who fle[d] regimes with which the United States ha[d] good relations, irrespective of their human rights records.”¹²

Echoing Helton’s assessment of the massive influence that Cold War politics had on refugee and asylum policy, Gil Loescher and John Scanlan, writing in 1986, note that from the 1950s through the 1980s, “foreign policy choices ordinarily [played] the key role in determining which refugees [would] be permitted to enter the United States.”¹³ They saw as the driving force behind this foreign policy dominance a group of government insiders, “[g]uided . . . by the view that ‘each refugee from the Soviet orbit represents a failure of the Communist system,’”¹⁴ who viewed refugees as “valuable ‘assets’ in an ongoing struggle with Communism.”¹⁵ Clearly, those charged with administering the asylum system were slow to implement Congress’s humanitarian impulse. Loescher and Scanlan’s account garners support from

of that country; or who, not having nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Id.

7. Helton, *supra* note 2, at 247.

8. *Id.* at 248.

9. Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102.

10. See U.S. GENERAL ACCOUNTING OFFICE, UNIFORM APPLICATION OF STANDARDS UNCERTAIN 8 (1987) (affirming that “[o]ne of Congress’ primary objectives in adopting [the Convention refugee definition] was to eliminate discrimination on the basis of outmoded geographical and ideological considerations”); see also Martin, *Coast of Bohemia*, *supra* note 2, at 1262 (finding that it is clear from the legislative history that “Congress intended the refugee standards to be applied neutrally and without ideological bias”); Elizabeth M. Yarnold, *The Refugee Act of 1980 and the Depoliticization of Refugee/Asylum Admissions*, 18 AM. POL. Q. 527, 528 (1990) (“[T]he Refugee Act of 1980 clearly mandates a depoliticization of U.S. refugee and asylum policy.”).

11. In the 1980 Act, Congress defined a refugee as

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Pub. L. No. 96-212, 94 Stat. 102 (1980).

12. Helton, *supra* note 2, at 253.

13. GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA’S HALF-OPEN DOOR* xvii (1986).

14. *Id.* at xviii (quoting R. McCollum, U.S. Dep’t of State, ICMC *Migration News*, Nov.-Dec. 1958).

15. *Id.* at xvii.

a 1986 *New York Times* story about Attorney General Meese's Justice Department.¹⁶ Reportedly, the Department, concerned that its "asylum policy [was] inconsistent with [its] foreign policy" because Polish grant rates were too low in light of the country's Communist government, proposed new asylum regulations requiring that all applicants from "totalitarian" governments be presumed to be refugees. Though the presumption did not make it into the final proposed regulations,¹⁷ this account, which was not denied, gives valuable insight into how foreign policy continued to hold sway well into the 1980s, at least among decisionmakers in the Justice Department.

A foreign policy bias throughout the 1980s was also demonstrated quantitatively in a series of studies by Elizabeth Yarnold.¹⁸ She found that in the post-1980 period, both the State Department, which was tasked with making refugee resettlement determinations, and the INS, which decided asylum claims, granted relief more often to aliens from hostile countries than to those from non-hostile countries.¹⁹ She found that the former were almost 3,500% more likely than the latter to be recognized by the State Department as refugees in the period from 1982 to 1985, and were 4% more likely to be granted asylum by the INS between 1983 and 1985.²⁰

By the end of the 1980s, the humanitarianism of the 1980 Act began to replace foreign policy as the dominant basis for asylum adjudication. A major sign of this re-conceptualization came as the claims of persistent adjudicatory bias, discussed above, culminated in a 1987 class action lawsuit against Attorney General Meese.²¹ Brought on behalf of a class of asylum seekers from two U.S. ally countries—El Salvador and Guatemala—the suit alleged that the INS and the Executive Office for Immigration Review were biased against those class members on account of their nationalities.²² Instead of litigating the case, the government chose to settle. The agreement reached by the parties and ratified by the court contains strong language forbidding the

16. Robert Pear, *Plan to Give More Poles Asylum is under Study by Administration*, N.Y. TIMES, Mar. 30, 1986, § 1, at 1, col. 4.

17. See Asylum and Withholding of Deportation Procedures, 52 Fed. Reg. 32,552 (Aug. 28, 1987).

18. ELIZABETH M. YARNOLD, REFUGEES WITHOUT REFUGE: FORMATION AND FAILED IMPLEMENTATION OF U.S. POLITICAL ASYLUM POLICY IN THE 1980'S (1990); Yarnold, *supra* note 10; Elizabeth M. Yarnold, *Federal Court Outcomes in Asylum-Related Appeals 1980-1987: A Highly 'Politicized' Process*, 23 POL'Y SCI. 291 (1990).

19. Yarnold, *supra* note 10, at 532.

20. *Id.* There do seem to be problems with Yarnold's characterization of the data. Though Yarnold frames these refugee and asylum grant rates as two instances of the same phenomenon, the vast gap between them points to a disparity, even in the early 1980s, between State Department and INS outcomes, and by implication, to a significant difference in the role of foreign policy in the two agencies. One explanation for the disparity is that refugees identified by the State Department and asylees identified by the INS were selected from vastly different pools of applicants: the former were identified overseas in a limited number of pre-selected locations, while the latter were chosen from among those who traveled to the United States and subsequently applied for asylum.

21. *American Baptist Churches v. Meese*, 666 F. Supp. 1358 (N.D. Ca. 1987).

22. *Id.* at 1360-61; see also BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 250 (2004).

use of foreign policy considerations in asylum adjudications:

[U]nder the new asylum regulations as well as the old: foreign policy and border enforcement considerations; . . . the fact that an individual is from a country whose government the United States supports or with which it has favorable relations, . . . [and] whether or not the United States Government agrees with the political or ideological beliefs of the individual [are] not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.²³

The government's decision to settle the matter and readjudicate the claim of every class member who had been denied relief was seen by critics as an admission that adjudication of these claims had been carried out in a biased manner.²⁴

More evidence that humanitarianism has successfully supplanted foreign policy as the preferred basis for asylum adjudications came with the Second Circuit's decision in *Doherty v. INS*.²⁵ The court, on its way to determining that the Attorney General had abused his discretion in denying asylum for reasons of foreign policy, examined the legislative history behind the 1980 Refugee Act. It found that Congress, "[b]y defining eligibility in politically neutral terms, . . . made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum."²⁶

Finally, two reforms internal to the asylum adjudication system also reflect the rise of humanitarianism. First, the Department of State, which had played a central role in asylum adjudications by issuing advice letters regarding each individual asylum case adjudicated by the district offices or immigration courts, stopped doing so in February 1988.²⁷ While the Department still receives all asylum files, it now has the option of summarily noting that it has nothing to add.²⁸ These notations have the effect of "mak[ing] it clearer than the old form letters did that the Department has nothing to add, . . . [thus leaving it] more clearly to the immigration judge to decide based on the record,"²⁹ and not on the basis of foreign policy dictated by the State Department.

Second, in July of 1990 the INS formed a new professional Asylum Officer Corps to take over the entire asylum caseload of the "unspecialized, under-

23. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Ca. 1991).

24. *See, e.g.*, SARAH IGNATIUS, THE NATIONAL ASYLUM STUDY PROJECT: AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 19 (1993) ("By settling, the government implicitly acknowledged serious flaws in its previous asylum adjudication process.").

25. 908 F.2d 1108 (1990).

26. *Id.* at 1119, *rev'd on other grounds*, 502 U.S. 314 (1992).

27. *Martin, Coast of Bohemia*, *supra* note 2, at 1311.

28. *Id.*

29. *Id.* at 1312.

paid, and overworked” INS Examiners.³⁰ Its formation was aimed at “carry[ing] out the spirit and intent of the Refugee Act of 1980 by applying a single standard of asylum eligibility, regardless of an applicant’s place [of] origin or place of adjudication.”³¹ The regulations establishing the Corps went so far as to recognize that “the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process.”³²

Both foreign policy and humanitarianism have, at times, been employed as the dominant basis for the adjudication of U.S. asylum claims. Through the Refugee Act of 1980, Congress resolved the tension between the two in favor of humanitarianism; however, the executive branch failed to relinquish its foreign policy prerogative. Subsequent legislation, case law, and administrative rulemaking in favor of humanitarianism have more fully constrained the policymakers. Thus, the use of foreign policy considerations in asylum adjudications is currently discouraged, if not impermissible, and any apparent bias should be investigated as suspect.³³

III. THE WAR ON TERROR AND FOREIGN POLICY

A. *The Cognitive Impact*

The attacks of September 11, 2001, triggered the beginning of a new era in American foreign policy. In serving as the backdrop for the global War on Terror and constituting George W. Bush’s war presidency, their impact has been enormous, not only in real terms but also in framing—and thus to a large extent defining—our country’s post-9/11 reality.

The War on Terror is admittedly not a traditional war. It has taken many forms and has inspired (or at least influenced) the formation of most American foreign policy so far this century. Its more notorious characteristics include its open-endedness, its pervasiveness, and the amorphousness of our terrorist enemies. First, we are dealing with a long-term engagement. Unlike in traditional warfare, there is no concrete set of objectives that, once achieved, will signal our decisive victory; instead, the Bush administration defines victory as the eradication of global terrorism. While continuing to maintain that the war is winnable, they concede that we will be fighting the

30. Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 274–75 (1992).

31. *Id.* at 282 (quoting INS Commissioner Gene McNary, Remarks at the Opening of the New Asylum Offices, Arlington, Virginia (Apr. 2, 1991)) (internal quotes omitted).

32. *Id.* at 275.

33. At the same time, there are those who argue for a greater role for foreign policy in asylum adjudications. *See, e.g.*, Price, *supra* note 2 (arguing from the global history of asylum law that the United States should favor a political conception of asylum); Griffin, *supra* note 2 (arguing that the United States should temper humanitarianism with foreign policy in order to check its “overeager grants of asylum benefits”). These positions will be discussed further in Part V, *infra*.

enemy for a long time to come.³⁴

Second, our enemies are difficult to identify and even harder to fight. This is perhaps the greatest difference from past wars, up to and including the Cold War. The paradigmatic terrorist organization, al Qaeda, is decentralized, operating as a network of loosely affiliated cells that act relatively autonomously. The historically effective U.S. response to hostile enemies—progressively stronger diplomatic strategies, followed by the threat and eventually the execution of traditional warfare—has been less than decisive in dealing with these enemies. While continuing to use traditional tactics against those territorial states harboring or otherwise supporting our terrorist enemies, the administration has taken innovative steps designed to more directly deal with terrorist threats, steps that more closely resemble law enforcement than warfare.

These law enforcement–like strategies aimed at non-state actors have defined the War on Terror’s third characteristic, its pervasiveness. It is being fought globally, regionally, and locally; at home and abroad; and against citizens, permanent residents, and foreign nationals. Its tactics include extraordinary rendition, extrajudicial detentions at Guantánamo, domestic spying, and the designation of individuals as enemy combatants. It has been used to lend rhetorical support to a diverse set of initiatives, from the war in Iraq to enhanced U.S. border security. In short, the War on Terror, in serving as the backdrop for all foreign—and many domestic—policy debates, constitutes the cognitive context for a significant portion of all contemporary U.S. government decisionmaking.

B. *Changes in Immigration Law*

Immigration law and policy have played a special role in the prosecution of the War on Terror. The 9/11 attacks were carried out by foreigners who had been admitted to the United States as nonimmigrants, and several of the attackers were in violation of their student visa terms but had not been subjected to enforcement actions. It is thus not surprising that much of the government’s post-9/11 restructuring has been directed at the immigration system.

Three large-scale reforms have been emblematic of this restructuring. They are the abolition of the INS and the reconstitution of its functions in the Department of Homeland Security (DHS), the introduction of major immigration enforcement efforts such as Operation Liberty Shield and the US-VISIT

34. The State Department’s assessment at the beginning of 2002 was that the war was “certain to last well into the future.” U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2001 2 (2002), available at <http://www.state.gov/documents/organization/10319.pdf> [hereinafter TERRORISM 2001]. In 2006 they announced that “we are still in the first phase of a potentially long war,” and that “[i]t is likely that we will face a resilient enemy for years to come.” U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2005 15 (2006), available at <http://www.state.gov/documents/organization/65462.pdf> [hereinafter TERRORISM 2005].

program, and various provisions of the USA PATRIOT Act of 2001³⁵ and the REAL ID Act of 2005³⁶ designed to make asylum grants more difficult to achieve. In addition to ostensibly providing tangible security benefits, these highly publicized and often politically contentious programs have been used by the administration to send a message of stricter enforcement of our immigration laws, often at the expense of our nation's commitment to humanitarianism.

In establishing DHS, the Homeland Security Act of 2002 defined the Department's mission in part as "carry[ing] out all functions of entities transferred to the Department,"³⁷ including the INS. The drafters, undoubtedly anticipating the institutional difficulties inherent in having a security-minded department administer non-security-related programs such as immigration benefits, also included as part of the Department's mission "ensur[ing] that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress."³⁸ However, no simple statutory admonishment, standing alone, can overcome the bureaucratic tendencies of a vast government department "whose primary mission is to protect our homeland."³⁹ The granting of humanitarian immigration benefits has certainly suffered since 9/11, due at least in part to this security-driven governmental reorganization.⁴⁰

A second post-9/11 immigration law reform was reflected in a number of immigration enforcement initiatives. These included Operation Liberty Shield, which mandated detention for the duration of their processing period of asylum seekers from countries where al Qaeda was active, the detention without bond of Haitian asylum-seekers,⁴¹ and the cracking down on asylum-seekers by criminally charging those who tried to enter the United States with false documents. These initiatives clearly underlined the administration's determination to err on the side of security when dealing with humanitarian immigration benefits.⁴²

The third category of reforms was achieved through the tightening of

35. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

36. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

37. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, § 101(D).

38. *Id.* at § 101(E).

39. See GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY 1 (2002), available at <http://www.dhs.gov/interweb/assetlibrary/book.pdf>.

40. See Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323 (2005) ("Since September 11th, the United States has focused on fighting terrorism at a serious cost to our humanitarian programs.").

41. See, e.g., *In re D-J-*, 23 I. & N. Dec. 572 (BIA 2003).

42. See Press Release, Department of Homeland Security, Operation Liberty Shield (Mar. 17, 2003), available at http://www.dhs.gov/xnews/releases/press_release_0115.shtm (last visited Nov. 10, 2006); *In re D-J-*, 23 I. & N. Dec. 572 (A.G. 2003); Stanley Mailman & Stephen Yale-Loehr, *Detaining and Criminalizing Asylum Seekers*, 8 BENDER'S IMMIGR. BULL. 764 (May 1, 2003). See also Schoenholtz, *supra* note 40, at 330-32.

statutory immigration law. For example, the USA PATRIOT and REAL ID Acts “significantly broadened the scope of the material support bar [whereby those who have provided even de minimis material support to a terrorist organization are barred from entering the U.S.] by expanding the definition of ‘terrorist activity’ and ‘terrorist organization,’ relaxing the bar’s mens rea requirement, and limiting the availability of a discretionary waiver.”⁴³ This material support bar has been used to deny entry to bona fide refugees who have provided support to rebel groups either under duress or inadvertently.⁴⁴ In other words, many refugees who are fleeing persecution are denied refuge in the United States because they were forced to provide minimal services to armed rebel groups. As outlined above, the strict application of this regulation is indicative of the hard line that DHS and the rest of the administration is taking in privileging the pursuit of an incremental increase in security over a fair humanitarian policy.

The War on Terror is being fought on many fronts and has been the administration’s central foreign policy focus since 9/11. The broad reforms to national security and immigration law mentioned above, together with dozens of other government programs, the wars in Afghanistan and Iraq, and ceaseless media coverage—not to mention the initial airliner attacks and the subsequent London and Madrid bombings—have had the effect of constructing a new reality in which the administration’s foreign policy objectives are often found to trump the goal of humanitarianism, even when the former are slight and the latter is compelling.

IV. THE WAR ON TERROR AND ASYLUM ADJUDICATION

This study is designed to identify any correlation between U.S. foreign policy objectives in the War on Terror and trends in U.S. Immigration Court asylum adjudications. As discussed above,⁴⁵ foreign policy is a disfavored basis for granting or denying asylum, having given way during the 1980s to “a finely calibrated individualized judgment of the risk of persecution the applicant would face in the homeland.”⁴⁶ However, as Professor David Martin noted in 1990, “[p]ublic debate on asylum policy . . . proceeds in cruder terms. Partisans are often ready to make sweeping judgments, by nationality, about the merit of large groups of asylum-seekers.”⁴⁷ In the context of the Cold War, he identified two prominent schools of thought: one that assumed that virtually anyone fleeing a Communist country would face persecution upon return, and another that felt the same way about those

43. GEORGETOWN UNIVERSITY LAW CENTER HUMAN RIGHTS INSTITUTE, UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR 9–10 (2006).

44. *See id.* at 22.

45. *See supra* Part II.

46. Martin, *Coast of Bohemia*, *supra* note 2, at 1273.

47. *Id.*

fleeing El Salvador and Guatemala.⁴⁸ My question is whether and to what extent a third school has emerged, one that takes as its category of assumed persecutors those countries that are uncooperative with the United States in the War on Terror.

A. *Methodology: Designating Allies and Enemies*

In order to carry out this study, I must first classify countries as enemies or allies of the United States in the War on Terror. These classifications are necessarily imperfect; however, I believe that the methods used provide a reasonable picture of U.S. foreign policy as it relates to terrorism, which in turn sheds light on the central concern of this paper, bias in asylum adjudications.

In attempting to classify countries for the purposes of this study, a number of fundamental difficulties arise. First, terrorism, as defined by the U.S. Congress, is “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”⁴⁹ Different groups apply the definition in different ways so that one country’s terrorist is another’s freedom fighter,⁵⁰ and disagreements about the legitimacy of a given use of force abound. Thus, designations of terrorist organizations by the State Department are necessarily contingent, resting on its foreign policy objectives and its bureaucratic biases. However, this methodological difficulty may be addressed by clarifying the scope of this paper; it is not my goal to second-guess the State Department in its designation of foreign terrorist organizations, but instead to explore the effects of such designations as one of many inputs into the asylum adjudication process.

Second, the definition clearly states that terrorism is violence carried out by “subnational groups or clandestine agents.”⁵¹ Hence, sovereign states, in supporting terrorism, typically do not deploy their military or engage in other overt acts tending to indicate involvement. Thus, the degree of a state’s involvement with terrorist organizations will always be in question, but again, I will defer to the State Department’s determinations. As an example, Somalia is an “enemy” for the sake of this study because its “lack of a functioning central government, protracted state of violent instability, long ungarded coastline, porous borders, and proximity to the Arabian Peninsula make it a potential location for international terrorists seeking a transit or

48. *Id.* at 1273–74.

49. 22 U.S.C. § 2656f(d) (2000).

50. This is seen clearly in the State Department’s assessment of Syria’s sponsorship of terrorism: “Syrian officials have publicly condemned international terrorism, but make a distinction between terrorism and what they consider to be the legitimate armed resistance of Palestinians in the occupied territories and of Lebanese Hizballah.” U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2004 90 (2005) [hereinafter *TERRORISM* 2004].

51. 22 U.S.C. § 2656f(d).

launching point to conduct operations elsewhere.”⁵² Likewise, for the purposes of this study, a failure to crack down on terrorist organizations is taken as proof of a state’s acquiescence to a terrorist organization’s presence.⁵³

Third, as opposed to the Cold War–era foreign policy paradigm, in which the power of the Soviet Bloc provided incentives for countries to publicly identify as “against us,” the post–Cold War hegemony enjoyed by the United States makes it difficult for most countries to openly defy its foreign policy objectives. Whereas classifying hostile states during the Cold War was as simple as identifying those countries with communist, socialist, or leftist governments,⁵⁴ today China’s communist government is a strong ally in the War on Terror.⁵⁵ The global political situation is fairly dynamic, with a number of countries becoming at least facially more cooperative with the United States in the wake of September 11,⁵⁶ and one—Venezuela—becoming increasingly antagonistic. Complicating the classification further is the fact that many states may act hypocritically, declaring their solidarity with and providing at least token support for the War on Terror, while acquiescing to the activities of—or being unwilling to control—the terrorist groups operating within their borders.⁵⁷

Even given these difficulties, it is possible to construct a table of allies and enemies of the United States in the War on Terror. For each year in the sample period, I consulted the annual State Department report on terrorism,⁵⁸ which details the extent to which the governments of foreign countries cooperated

52. TERRORISM 2004, *supra* note 50, at 31.

53. See, for example, Iran’s failure to satisfactorily punish senior al Qaeda members. *Id.* at 88.

54. See Barbara M. Yarnold, *Administrative Policy Making: Adjudication by the Board of Immigration Appeals in Asylum-Related Appeals 1980-87*, 9 POL’Y STUD. REV. 681, 684 (1990).

55. See TERRORISM 2004, *supra* note 51, at 36 (“China continues to take a clear stand against international terrorism and is broadly supportive of the global war on terror. China holds regular counterterrorism consultations with the United States, and is supportive of international efforts to block and freeze terrorist assets.”).

56. Some of the countries that have become more cooperative have ostensibly done so by choice (Pakistan, Sudan, Libya, and Syria), and others have been compelled to become more cooperative through regime change (Afghanistan and Iraq). *Cf.* NATIONAL STRATEGY FOR COMBATING TERRORISM 20 (Feb. 2003), available at http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf (detailing the U.S. strategy of coalition building as (1) working with willing and able states, (2) enabling weak states, (3) persuading reluctant states, and (4) compelling unwilling states).

57. Lebanon, Libya, Sudan and Syria have all cooperated in the War on Terror, but each supports or maintains contacts with terrorist organizations. TERRORISM 2004, *supra* note 51, at 65–66, 89–91.

58. TERRORISM 2005, *supra* note 34; TERRORISM 2004, *supra* note 51; U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 (2004), available at <http://www.state.gov/documents/organization/31912.pdf>; U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2002 (2003), available at <http://www.state.gov/documents/organization/20177.pdf> [hereinafter TERRORISM 2002]; TERRORISM 2001, *supra* note 34; U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2000 (2001), available at <http://www.state.gov/s/ct/rls/crt/2000/>; U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 1999 (2000), available at <http://www.state.gov/www/global/terrorism/1999report/patterns.pdf>; U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 1998 (1999), available at <http://www.state.gov/www/global/terrorism/1998report/1998index.html>; U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 1997 (1998), available at <http://www.state.gov/www/global/terrorism/1997report/1997index.html>; U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 1996 (1997), available at <http://www.state.gov/www/global/terrorism/1996report/1996index.html>.

with the United States during that year to prosecute and prevent acts of international terrorism in that country.⁵⁹ The country-specific entries are fairly concise, averaging less than one page in length, and I used them to classify the countries as allies or enemies for that year, based on their tone and substance. No designation was made if a country was not mentioned in that year's report or the description was not sufficiently detailed to allow classification. The results of this year-by-year classification can be seen in Table 1.

This table demonstrates that, while most countries have retained their status as an enemy or an ally of the United States throughout the sample period, seven countries in the sample—Afghanistan, Iraq, Libya, Pakistan, Sudan, Syria, and Venezuela—changed from ally to enemy or from enemy to ally between 2001 and 2003.

B. *Asylum Adjudications in Immigration Court*

In this study I focus on asylum adjudications in Immigration Courts, the “trial courts” of the immigration system.⁶⁰ For those asylum applicants who are not immediately granted relief by an Asylum Officer (AO), Immigration Court is their only real chance for a grant. Thorough data on asylum grant rates in Immigration Court by year and by applicant's country of origin are publicly available. Though limited data are also available for asylum adjudications at the administrative appeals level, in the Board of Immigration Appeals (BIA), fewer than twenty percent of cases decided in Immigration Courts are appealed to the BIA.⁶¹ Additionally, the widely available BIA data do not break determinations down by type or country of origin, as do those from the Immigration Courts, so the analysis that follows would not be possible with any currently available data set other than that provided by the Immigration Courts.

Using the ally/enemy determinations made below,⁶² I analyzed data provided by the Executive Office of Immigration Review on Immigration

59. This annual report is mandated by and described in 22 U.S.C. § 2656f(a)(3). Please note that these reports were being compiled before the War on Terror, as such, had begun.

60. There are three procedural paths to political asylum in the United States. First, an asylum seeker may apply for and be granted asylum affirmatively, by lodging an application with the Asylum Office of the U.S. Citizenship and Immigration Services, and undergoing a non-adversarial interview with an Asylum Officer. If the Asylum Officer finds that the asylum seeker has not met his or her burden and is thus not eligible for an affirmative grant of asylum, the case is referred to Immigration Court, an administrative court within the U.S. Department of Justice, which then holds an adversarial hearing on the merits of the asylum claim. Finally, an individual who is placed in removal hearings in Immigration Court for any reason at all may raise asylum as a defense against removal, even if he or she never affirmatively sought asylum before being placed in proceedings.

61. EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2005 STATISTICAL YEAR BOOK Y1 (2006), available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>.

62. See *infra* Table 1.

TABLE 1. U.S. ALLIES AND ENEMIES IN THE WAR ON TERROR BY YEAR

	1997	1998	1999	2000	2001	2002	2003	2004	2005
Afghanistan	enemy	enemy	enemy	enemy	enemy	ally ^a	ally ^a	ally ^a	ally ^a
Azerbaijan	-	-	ally	ally	ally	ally	ally	ally	ally
Bangladesh	-	-	-	-	-	-	-	ally ^a	ally ^a
Burma	-	-	-	ally	ally	ally	ally	-	-
China	-	-	-	-	ally	ally	ally	ally	ally
Colombia	ally ^a	ally ^a	ally ^a	ally ^a	ally ^a	ally ^a	ally ^a	ally	ally
Cuba	enemy	enemy	enemy	enemy	enemy	enemy	enemy	enemy	enemy
Egypt	-	ally	ally	ally	ally	ally	ally	ally	ally
Georgia	ally	ally	ally	ally	ally	ally	ally	ally	ally
Haiti	-	-	-	-	-	-	-	-	-
India	ally	ally	ally	ally	ally	ally	ally	ally	ally
Iran	enemy	enemy	enemy	enemy	enemy	enemy	enemy	enemy	enemy
Iraq	enemy	enemy	enemy	enemy	enemy	enemy	ally ^a	ally ^a	ally ^a
Kyrgyzstan	-	ally	ally	ally	ally	ally	-	ally	ally
Lebanon	ally ^b	ally ^b	ally ^b	ally ^b	ally ^b	ally ^b	ally ^b	ally ^b	ally ^b
Libya	enemy	enemy	enemy ^c	enemy ^c	enemy ^c	ally ^d	ally ^d	ally ^d	ally ^d
Nepal	-	-	-	-	ally	ally	ally	ally	ally
North Korea	enemy	enemy	enemy	enemy	enemy	enemy	enemy	enemy	enemy
Pakistan	-	enemy	enemy	enemy	enemy	ally	ally	ally	ally
Russia	ally	ally	ally	ally	ally	ally	ally	ally	ally
Somalia	-	-	-	-	enemy	enemy	enemy	enemy	enemy
Sri Lanka	ally ^a	ally ^a	ally ^a	ally ^a	ally	ally	ally	ally	ally
Sudan	enemy	enemy	enemy	enemy	enemy	ally ^b	ally	ally ^e	ally ^e
Syria	enemy	enemy	enemy	enemy	enemy	ally ^b	ally ^b	ally ^b	ally ^b
Turkey	ally	ally	ally	ally	ally	ally	ally	ally	ally
Venezuela	-	-	-	-	ally ^b	enemy	enemy	enemy	enemy

^a chaotic^b support numerous terrorist groups^c distancing itself from terrorism^d residual contacts with terrorism^e complicated by Darfur

Court asylum adjudications from FY 1997 to FY 2005.⁶³ I examined trends in

63. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 2005 ASYLUM STATISTICS (2006), *available at* <http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 2004 ASYLUM STATISTICS (2005), *available at* <http://www.usdoj.gov/eoir/efoia/FY04AsyStats.pdf>; EXECU-

grant rates,⁶⁴ comparing the courts' treatment of people from states that are allies and enemies. If the Immigration Courts are operating under a Cold War-style foreign policy bias, we would expect to discover that enemies garner higher grant rates than allies, since a high grant rate constitutes a de facto finding by the U.S. government that the country is persecuting its citizens.⁶⁵ Conversely, if asylum adjudications are being conducted in a manner that is neutral to foreign policy concerns, we would expect grant rates not to be significantly correlated to ally or enemy status, but instead to be based primarily on the individualized humanitarian concerns required by the legal standard, namely the risk of persecution faced in the homeland.⁶⁶ A third option, which was neither expected nor seen, would have allies receiving higher grant rates than enemies.

As shown in Figure 1, there is no significant difference between the average grant rates of allies and those of enemies in the sample period. Both fluctuate between 30 and 60 percent, with no discernable temporal trend. In contrast to asylum determinations during the Cold War, these data tend to show that the politics of an alien's country of origin is not currently the driving force behind Immigration Court asylum determinations.

However, when we focus on those individual countries that have "changed sides" in the War on Terror, we begin to see a trend. Recall that under a foreign policy-driven paradigm, we would expect our enemies to have higher grant rates than our allies. As shown in Figure 2, of the seven countries that went from enemy to ally or from ally to enemy between 1997 and 2005, six of them demonstrate a higher grant rate during the period that they were classified as enemies than they did during the period that they were classified

TIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 2003 ASYLUM STATISTICS (2004), *available at* <http://www.usdoj.gov/eoir/efoia/FY03AsyStats.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 2002 ASYLUM STATISTICS (2003), *available at* <http://www.usdoj.gov/eoir/efoia/FY02AsyStats.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 2001 ASYLUM STATISTICS (2002), *available at* <http://www.usdoj.gov/eoir/efoia/FY01AsyStats.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 2000 ASYLUM STATISTICS (2001), *available at* <http://www.usdoj.gov/eoir/efoia/FY00AsyStats.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 1999 ASYLUM STATISTICS (2000), *available at* <http://www.usdoj.gov/eoir/efoia/FY99AsyStats.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 1998 ASYLUM STATISTICS (1999), *available at* <http://www.usdoj.gov/eoir/efoia/FY98AsyStats.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS FY 1997 ASYLUM STATISTICS (1998), *available at* <http://www.usdoj.gov/eoir/efoia/FY97AsyStats.pdf>. Please note that the State Department reports refer to calendar years and the EOIR data is for fiscal years. I do not believe that this three-month temporal shift is a significant confounding factor in this study because the relevant trends continue for several years.

64. The asylum grant rate for a country in a given year is the number of successful asylum petitions (outright and conditional grants) divided by the total number adjudicated on their merits. Using EOIR's terminology, the grant rate formula is (GRANTED + CONDITIONAL) / (GRANTED + CONDITIONAL + DENIED).

65. See Price, *supra* note 2, at 308 ("[G]ranting asylum follows a judgment that the asylum-seeker, if refused asylum, would be exposed to a wrongful exercise of political authority.").

66. See Martin, *Coast of Bohemia*, *supra* note 2, at 1273.

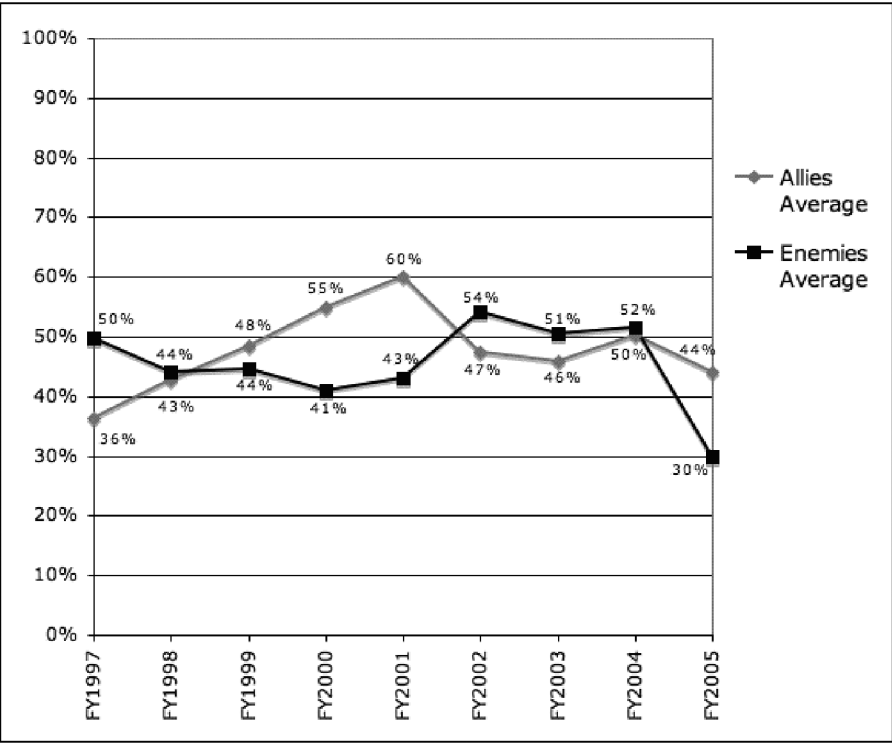


Figure 1. Grant Rates: Average of All Allies and of All Enemies

as allies. Quantifying this, there was a twenty-point difference between the average enemy and the average ally grant rate: in this group, aliens from enemy countries were granted asylum 48 percent of the time, while those from ally countries were granted asylum 28 percent of the time. Taking these two results together, it appears that, while there is no general relationship between a country’s ally or enemy status and its asylum grant rate, there is a correlation between enemy status and grant rate in the period surrounding a change in the country’s foreign relations with the United States.

V. ANALYSIS: THIS IS NOT THE COLD WAR

A. Potential Explanations for the Observed Phenomenon

As discussed above, this study shows that while there is no generalized correlation between a country’s relationship to the United States vis-à-vis the War on Terror and U.S. asylum grant rates for that country, these two factors are correlated for those countries that have “changed sides” in the War on Terror. There are a number of potential explanations for this phenomenon.

First, a regime change brought about by the U.S.-led coalition has the potential both to change the foreign policy stance of the United States toward

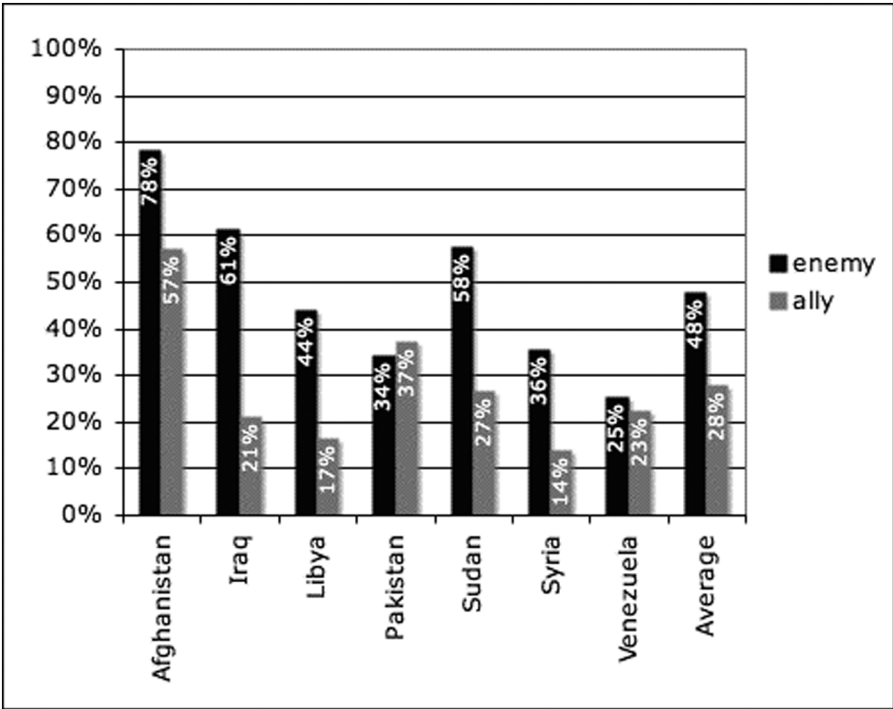


Figure 2. Longitudinal Grant Rates for Enemy/Ally Countries, 1997-2005

that country and to usher in a more humanitarian regime less apt to persecute its citizens. This is arguably the case in Afghanistan and Iraq, where the U.S.-friendly regimes after the respective wars have been less apt to persecute enemies. That is not to say that the situation on the ground is objectively better for any given sector of the population, only that the government is not deemed by U.S. Immigration Courts to be active or complicit in persecution, or unable to control its territory where persecution is occurring.⁶⁷

Of course, this explanation does not answer, but instead begs, the question of causality. That is, does a regime change brought about by the United States tend to lead to a more humanitarian government, under which the level of persecution declines and is then reflected neutrally by the Immigration Courts' determinations? Or are asylum determinations dependent in part on the foreign policy pronouncements of the State Department, which in turn are informed by the administration's political goal of rewarding enemies-turned-

67. Of course, persecution in Afghanistan and Iraq continues, but its nature has changed, and with it the numbers of successful asylum seekers. For example, Iraqi individuals seeking asylum based on past or potential future political persecution by Saddam Hussein's Baathist Party will not be granted asylum, but Iraqi Coptic Christians continue to be persecuted on the basis of their religion. Without access to more detailed data detailing—at a minimum—each asylum seeker's claimed basis for persecution and, if denied, the reason for denial of her claim, a more comprehensive picture of the changing nature of asylum adjudications will remain elusive.

allies? The truth likely lies somewhere between these extremes.

A second explanation, related to regime change but distinct from it, is that some governments wanting to get on the “good side” of the United States in the wake of the War on Terror have tempered their hard-line tactics towards their people. This may explain Libya’s dramatic drop in grant rates, from 44 percent to 17 percent, after Colonel Qadhafi’s government took dramatic steps to cooperate with the United States in the War on Terror.⁶⁸ A similar, though less dramatic, dynamic may explain the Syrian drop in grant rates.⁶⁹ However, it should be noted that both Libyan and Syrian nationals apply for asylum in the United States in very small numbers,⁷⁰ and for this reason the grant rates may not be illustrative of any greater trend.

Finally, it is possible that while the humanitarian goal of foreign policy blindness has to a large extent succeeded by bringing about the near-neutrality of asylum determinations, for those cases where the foreign policy pressures are particularly strong, the asylum system employs a foreign policy “release valve” which allows those pressures to become operative. The mechanism by which this release valve is implemented is unclear, but one candidate is Walter Lippmann’s “Coast of Bohemia” phenomenon, whereby decision-makers carry with them a necessarily imprecise, incomplete, and biased picture of the reality abroad.⁷¹ In the contemporary context, the hypothesis goes, asylum adjudicators import the cognitive impact of the War on Terror into their determinations.⁷² Because the discussion of the 9/11 attacks and the subsequent War on Terror has dominated public discourse for the past five years and has provided the impetus for several major rounds of legislative, judicial, and administrative lawmaking having a direct impact on

68. After the attacks of September 11, 2001, Qadhafi vocally aligned himself with the United States in the War on Terror, pledging that Libya would “combat members of al-Qaida . . . as doggedly as the United States” does, and “curtail[ing] its support for international terrorism.” *TERRORISM* 2002, *supra* note 58, at 80. As of 2002, Libya is a party to all twelve international conventions and protocols relating to terrorism. *Id.* Additionally, on May 15, 2006, Secretary of State Condoleezza Rice, citing “the excellent cooperation Libya has provided to the United States and other members of the international community in response to common global threats faced by the civilized world since September 11, 2001,” announced that the State Department will remove Libya from its list of state sponsors of terrorism. Press Release, U.S. Department of State, U.S. Diplomatic Relations with Libya (May 15, 2006), *available at* <http://www.state.gov/secretary/rm/2006/66235.htm>.

69. See *TERRORISM* 2002, *supra* note 58, at 81 (noting that Syria “has cooperated significantly with the United States and other foreign governments against al-Qaida, the Taliban, and other terrorist organizations and individuals” and has “discouraged any signs of public support for al-Qaida”).

70. Between FY1997 and FY2005, Libya averaged 3.5 asylum adjudications per year in Immigration Court, with a high of seven and a low of zero. In the same period, Syria averaged just under forty-eight per year, with a high of sixty and a low of thirty-six. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ASYLUM STATISTICS FY 1997-2005, *available at* <http://www.usdoj.gov/eoir/efoia/foiafreq.htm>.

71. Martin, *Coast of Bohemia*, *supra* note 2, at 1274 (“[T]he real environment is altogether too big, too complex, and too fleeting for direct acquaintance . . . To traverse the world men must have maps of the world. Their persistent difficulty is to secure maps on which their own need, or someone else’s need, has not sketched in the [nonexistent] coast of Bohemia.”) (quoting WALTER LIPPMANN, PUBLIC OPINION 16 (1922)).

72. For a discussion of the factors involved in creating the cognitive impact of the War on Terror, see *supra* Part III.A.

immigration, it is not surprising that the claims of an asylum seeker would be viewed in light of the significance of his or her sending country to the War on Terror.

Concededly, today's asylum adjudication biases are relatively subtle when compared with those observed during the Cold War. Due in part to those structural and substantive reforms designed to de-emphasize foreign policy within asylum adjudication—such as the professionalization of the asylum corps and the reduction of the State Department's role in the process⁷³—the Coast of Bohemia phenomenon appears to have been brought into sharper relief. However, the bias identified in this study is quite real, and the cognitive impact of the War on Terror is likely responsible for much of this bias.

B. *Humanitarianism or Foreign Policy: The Normative Question*

While not conclusive, this study finds that those countries which the United States had the most incentive to reward—or, in the case of Venezuela, to disapprove of—for their stances toward the War on Terror received asylum grants at rates commensurate with U.S. foreign policy goals.⁷⁴ While I do not suggest that Immigration Courts serve as a Cold War-style tool of policy in their role as asylum adjudicators, these data reveal a bias, whether conscious or unconscious, individual or structural, that deserves further study. While humanitarianism is the dominant factor today, asylum grants continue, in reality, to be the product of both humanitarian and foreign policy pressures, just as they have been throughout the history of asylum.⁷⁵ The question, then, is whether the current mix of humanitarianism and foreign policy—humanitarianism's rhetorical and actual dominance, with foreign policy's activity at the margins—is the right one for our time. A definitive answer is beyond the scope of this Note, but a few words are in order.

First, the relationship between humanitarianism and foreign policy should be situated against the background of the decline of sovereignty and the rise of non-state actors on the global stage. As the absolute veil of sovereignty lifts, allowing states to intervene in the sovereign affairs of other states in the

73. See *supra* text accompanying notes 27–32.

74. Pakistan is the notable exception. Its status as one of the United States' most steadfast allies in the War on Terror has been met with a slight increase in asylum grant rate. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *supra* note 67. Unfortunately, I have no ready hypothesis for this anomaly.

75. See Griffin, *supra* note 2, at 1155 (“While it is possible . . . that the Refugee Act tolled the death knell for the legitimacy of foreign policy considerations in all asylum-like determinations, this conclusion would require evidence that foreign policy considerations are no longer one of the accepted traditions of common asylum adjudication. But traditions are understandably difficult to extinguish.”); Price, *supra* note 2 (arguing from ancient Greek and early modern European practice that asylum developed as a forthrightly political practice); see also Doris Meissner, *Reflections on the Refugee Act of 1980*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 57, 64 (David A. Martin ed., 1988) (arguing that the 1980 Refugee Act established “a *process*, not a *policy*” in which refugee policy has “remained a mirror of our foreign policy,” and that “the two can never be fully divorced nor should they be”) (emphasis in original).

case of “humanitarian emergencies,” and as corporations, terrorist organizations, individuals, and other non-state actors become subjects of international law, the overarching importance of foreign relations as such gives way to a new balancing of individual and state importance. This new balancing, by promoting the importance of the individual, links up with the humanitarian impulse in asylum law.

Second, while humanitarianism is considered by many to be the only legitimate basis for asylum determinations,⁷⁶ recently several commentators have questioned this stance by urging a rehabilitation of the foreign policy basis. One argument for a more robust foreign policy consideration urges the maintenance of asylum’s expressive dimension.⁷⁷ In this view, allowing asylum’s role as a diplomatic sanction to lapse in favor of a wishy-washy humanitarianism that equates the victim of state-perpetrated torture with the victim of an earthquake because they both need assistance “is to miss the special horror of violence organized and exploited for political ends.”⁷⁸ In response, I would simply note that there are many ways to send a diplomatic message that do not require treating asylum seekers as “political footballs.” If faced with a choice between a missed opportunity to score geopolitical points on the one hand and the risk of refouling bona fide refugees fleeing one’s allies on the other, states should err on the side of humanitarianism.

A second pro-foreign policy argument emphasizes the fact that persecuted people need a different type of relief—protection from a persecutor—than do other forced migrants.⁷⁹ While economic migrants or those fleeing generalized violence may be helped with on-site aid or temporary safe haven in a neighboring country, “asylum is the *only* form of effective relief for victims of persecution, short of military intervention,”⁸⁰ and thus “those suffering persecution ought to enjoy a moral priority to asylum over other equally needy, but non-persecuted, people.”⁸¹ However, I believe that a predominantly humanitarian conception of asylum is entirely compatible with this position. Humanitarianism does not require that adjudicators shut their eyes to politics, only that they abstain from using individuals to “send a message” to other states.

A third argument, advanced by John D. Griffin, recommends that foreign policy’s role as a check on humanitarianism should be explicitly acknowledged in order to counteract overeager grants of asylum by political decision makers.⁸² This argument builds on the important result, mentioned above,⁸³ that both foreign policy and humanitarianism are always present in the

76. See *supra* notes 21–33 and accompanying text.

77. Price, *supra* note 2, at 310.

78. *Id.*

79. *Id.* at 309.

80. *Id.* (emphasis in original).

81. *Id.*

82. Griffin, *supra* note 2, at 1157–58.

83. See *supra* note 75.

asylum system, and it embraces the valuable notion that decision makers should seek to uncover and acknowledge any personal or structural biases in order to better bring the process in line with aspirational norms. Essential to his suggestion that foreign policy be used to keep humanitarianism in check, however, is the fact that Griffin is addressing the more political congressional and presidential *group* asylum grants. Applied to the progressively more non-political situation of *individual* asylum grants, I believe that an explicit acknowledgement of the role played by foreign policy should lead to the limiting of that role.

Ultimately, the continued exercise of foreign policy in asylum adjudications, even in exceedingly small doses, should be recognized and understood in order to continue to design systems that will limit its operation. The domain of asylum is the domain of humanitarianism, and every adjudicator should, as much as possible, promote the dignity of the individual by affording each applicant a fair hearing, untainted by the tit-for-tat nature of global politics.

VI. CONCLUSION

The 1980s saw a shift in attitudes toward the permissible basis of U.S. political asylum determinations. What had previously been a foreign policy prerogative was reconceived in humanitarian terms, and slowly the system changed to eliminate the bias in favor of asylum seekers from Communist countries. However, despite the humanitarian rhetoric, a grant of asylum today still constitutes a finding that the sending country engages in, allows, or is unable to control persecution within its borders. Although this communicative aspect of an asylum grant is unavoidable, the United States government must treat the negative foreign policy implications of any given grant of asylum as an unwanted side effect of an obligatory exercise of humanitarianism. In other words, humanitarianism should be the primary concern driving U.S. asylum adjudication, with foreign policy appearing only as an afterthought. Only when foreign policy has been relegated to such a secondary role will each individual asylum seeker receive a fair hearing on the merits of his or her case, and the United States will take seriously its humanitarian obligation to asylum seekers within its borders.